

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FILED
DEC 12 2008

MELISSA VOSS,

CIV. 08-4173

Plaintiff,

MEMORANDUM OPINION
AND ORDER OF DISMISSAL

vs.

RICHARD STEINMETZ, and
CAROL STEINMETZ,

Defendant.

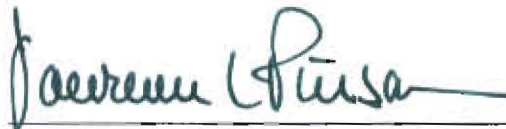
Plaintiff, Melissa Voss, has commenced an action to gain access to the Defendants' property and conduct an inspection of the premises. It appeared to this Court that an order for inspection of the premises could be obtained by proceeding under FED. R. CIV. P. 34 (c) and 45 (a)(1)(A)(iii), in the underlying action of *Melissa Voss v. State Farm Fire and Casualty Company*, CIV. 07-4143, and this Court issued an Order requesting input from the parties as to their positions on the Court permitting an inspection of the premises under FED. R. CIV. P. 34 (c) and 45 (a)(1)(A)(iii). The Defendant landowners have responded that they do not want to allow access to their property. Counsel for Plaintiff has responded that he does not wish to proceed under FED. R. CIV. P. 34 (c) and 45 (a)(1)(A)(iii) since the discovery deadline has passed in the underlying action.

Plaintiff asserts that Rule 34 does not preclude an independent action for permission to enter on to land. This Court agrees with that general assertion, however, the fact that Rule 34 does not preclude such an action does not authorize such an action before this Court when there is no independent basis for subject matter jurisdiction. *See Reilly Tar & Chemical Corp. v. Burlington N. R.R. Co.*, 589 F.Supp. 275 (D. Minn. 1984). The lack of subject matter jurisdiction cannot be waived, and may be raised *sua sponte* by a court at any time. *See GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 828 (8th Cir.2004); *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir.1993). The complaint in this independent action does not establish diversity or federal question jurisdiction under either 28 U.S.C. §1331 or §1332. Accordingly,

IT IS ORDERED that the above action is dismissed for lack of subject matter jurisdiction.

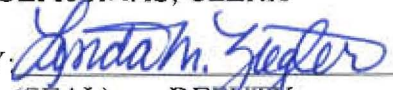
Dated this 12th day of December, 2008.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Lawrence L. Piersol", written over a horizontal line.

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
(SEAL) DEPUTY